**Agenda Item 55a**
**Agenda Id #4704**
**Alternate to Agenda ID #4659**

**State of California Public Utilities Commission**
**San Francisco**

**M E M O R A N D U M**

**Date:** June 15, 2005

**To:** The Commission
(Meeting of June 16, 2005)

**From:** Commissioner Susan P. Kennedy

**Subject:** In the Matter of Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, FCC CC Docket No. 98-170, CG Docket No. 04-208. Recommendation that Commission file comments supportive of FCC's actions to protect consumers via establishment of national disclosure rules in response to FCC Notice of Proposed Rulemaking re: Truth in Billing Rules.

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## RECOMMENDATION

That the Commission authorize Legal Division to file comments supporting the FCC's proposals in the FCC's Second Further Notice of Proposed Rulemaking in *In re Truth-in-Billing and Billing Format*, cited above. In particular, the Commission should express support for the FCC's efforts to protect consumers by establishing uniform disclosure requirements on a national basis for telecommunications carriers, including CMRS carriers. The CPUC's comments should support the FCC's proposed preemption of individual state authority over lines on customer bills as necessary to achieve uniform disclosure for carriers with interstate networks and nationwide billing systems, consistent with the Telecommunications Act and in the public interest, If the Commission authorizes this filing, opening comments must be filed no later than June 24, 2005; reply comments are due July 25, 2005.

## DISCUSSION

The FCC in the last 18 months has been grappling with massive changes in both technology and market structure in the telecommunications industry that have made dual jurisdiction between federal and state governments obsolete, difficult to enforce and costly for consumers. CMRS carriers, in particular, most of which today operate nationwide networks with nationwide calling plans and national billing systems, require the economies of scale provided by a nationwide marketing and billing system in order to maintain competitive services and lower prices for consumers. The FCC's recent proposal[1] to provide consumers with clear and uniform disclosure of information on carriers' bills requires that such disclosure regulations be implemented a national basis, necessitating federal preemption of state authority to impose specific line items on carriers' billing systems in each state.

Without FCC action, state and local governments would be able to impose their own unique billing regulations and ***change them at any time*** under the ever-expanding definition of "terms and conditions" of service. ***National CMRS carriers would have to redesign their billing systems each and every time a state or local government made changes to the bill format***. CMRS providers would be forced to pass on to customers the cost of constantly changing their billing systems, or worse, engineer their networks to design calling plans around individual state regulatory requirements, thereby eliminating some of the most popular and lowest-cost plans available to consumers today.[2]

Thus, FCC action to preempt individual state regulation of bill format is to the benefit of California consumers and promotes the public interest.

### A. The NPRM is legally sound

The FCC has the legal authority to establish a uniform national regime on this matter and is not using that authority indiscriminately to preempt states. The proposed rules are narrowly tailored to only preempt states from enacting laws specifically regulating carriers' use of line items on bills. The proposals do not preempt State laws and regulations that address the disclosure of rates for wireless service, nor generally applicable state contractual or consumer fraud laws. NPRM para. 33 – they only preempt the use of line items on bills.

To remove any doubt that the FCC had adequate authority to implement a unified, national framework, Congress amended section 2(b) of the Communications Act to eliminate the traditional limitation on federal authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" insofar as

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[1] *In re Truth-in-Billing and Billing Format*, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, FCC CC Docket No. 98-170, CG Docket No. 04-208: *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking* (Released March 18, 2005) ("NPRM").

[2] "NASUCA's request would force Verizon Wireless and other CMRS providers either to abandon their national and regional base rate plans and create hundreds, if not thousands, of rate plans to account for each taxing jurisdictions' separate taxes, surcharges, and fees, or to spread the cost of local taxes, surcharges and fees across nationwide rate plans." Verizon Wireless Jan. 25 *Ex Parte* at 4.

they relate to the provision of commercial mobile radio service. (47 U.S.C. § 152(b)). Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the well-established federal policy of a uniform, national and deregulatory framework for CMRS.

The Supreme Court has upheld the use of pre-emption in situations exactly like this. In particular, the Supreme Court has ruled that "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' *for [a] pre-emptive regulation's force does not depend on express congressional authority to displace state law*."[3] "'[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[4] "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority."[5]

State regulations that prohibit a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates. The converse is also true: a state rule requiring CMRS carriers to segregate particular costs into line items represents the other side of the same coin, and similarly would limit a carrier's ability to set and structure its rates.

A CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction. NPRM para. 31. By addressing what may or may not be presented as part of a provider's rate, regulations of the sort preempted by the NPRM would directly affect what subscribers see as the provider's rates, which the Act expressly precludes states from regulating. NPRM footnote 90. Efforts by individual states to regulate CMRS carriers through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. NPRM para. 35.

The Legal memo argues that "the FCC's concern to preempt even state laws that regulate terms and conditions of service … directly conflicts with the dual system of federal-state regulation that Congress established in section 332(c)(3)(A)." But the dual system that Congress had in mind did not pertain to rates, it related to treatment of things other than rates and terms of entry, i.e., "generally applicable consumer protection laws." As explained above, rules that specify how carriers display charges become *de facto* rate regulation since they set the structure for rates, and are therefore not the terms and conditions of service that section 332(c)(3)(A) assigns to states.

The NPRM also suggests that the FCC has other authority for preempting state regulation of the billing practices of wireless carriers when the state regulations are inconsistent with the FCC's

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[3] *City of New York*, 486 U.S. at 64, quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added)

[4] *Id*. at 63-64, quoting *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

[5] *Id.* at 64. Note - The Legal Division memo incorrectly focuses on whether the FCC narrowly or broadly interpreted section 332(c)(3)(A), ignoring the mention of this point in para. 35.

national  truth-in-billing rules, guidelines, and principles. The NPRM cites two potential bases for support:

- Requiring wireless carriers to satisfy 50 different states' sets of rules relating to consumer disclosures and the details on bills would stifle the further development of wireless competition and unreasonably burden interstate commerce, in contravention of the U.S. Constitution's Commerce Clause. NPRM para. 50.
- Sections 201(b) and 205(a) of the Act give the Commission "express preemptive authority over state regulatory agencies with respect to prescribing billing format and content, including line-item charges." NPRM para. 50.

The CPUC should file comments that support the FCC using this authority to set uniform national billing standards for those CMRS services.

## B. The NPRM Proposal to Define Terms and Conditions Via Rulemaking Is Good Law and Good Policy

Resolving ambiguities concerning what constitutes a "term and condition" of service through a rulemaking is good public policy and efficient regulation.  Dealing with each State and each regulation through separate litigation would result in endless litigation. The cost of that litigation would certainly be borne by ratepayers. Because these are nation-wide companies, even if the CPUC did not impose any regulations that were overturned, the inevitable legal challenges would lead to costs to taxpayers and carriers.  In addition, carriers that offer national service will spread the costs of litigating against invalid regulations imposed by other states across ratepayers throughout the nation, which will mean that Californians must pay for litigation anywhere throughout the nation.[6]

## C. The NPRM is not a threat to state flexibility

Although the FCC's proposed rules would preempt the CPUC from regulating line items on bills, the CPUC is free to enforce 9and the California legislature is free to enact) general consumer protection regulations that would apply to telecommunications carriers. For example, the CPUC could require carriers to include a billing insert brochure which explains rates, as long as the CPUC did not regulate the lines on the bill.  In addition, Section 332(c)(3) also allows States to petition the FCC for authority to regulate the rates for any CMRS if the State demonstrates that market conditions fail to adequately protect subscribers from unjust and unreasonable rates or rates that are unreasonably discriminatory.

Finally, the CPUC should note that any  lost flexibility is more than offset by the expected reduction in costs for ratepayers from a national truth in billing regime.

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[6] The Legal Department memo argues that a general rulemaking is improper and that the FCC should instead examine each specific state rule or regulation in the context of an individual dispute. It cites as support for this conclusion *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) in which the court ruled that whether a particular state rule or regulation should be preempted because it is more specific than an FCC rule requires a determination of whether there is an irreconcilable conflict between the state rule and Congress's intended federal scheme.  Such a scheme, however, would lead to endless litigation and is therefore inconsistent with Congress's intentions.

## D. Consumers will still be protected if the FCC issues a preemption order

The FCC's proposed order promotes consumer choice and ensures the uniformity and consistency of billing disclosures across all states. Californians will benefit from this single nationwide disclosure scheme, which will ultimately lead to lower prices as a result of economies of scale and scope made possible by consistent regulations.

In addition, numerous federal laws and regulations already protect customers from false or misleading charges on their phone bills: the Telephone Disclosure and Dispute Resolution Act (TDDRA), the Truth in Lending Act (TILA), and the FCC's own Truth-in-Billing Order. The wireless industry has also implemented its own CTIA Consumer Code[7] and the major wireless carriers have entered into a settlement with the attorney generals of 32 other states, setting a pattern of nationwide uniformity with respect to those carriers' sales and marketing practices.

There is no reason to believe that Californians have a different or greater need for understandable bill disclosures than other Americans, or that the FCC's proposed rules won't meet that need. Indeed, the existing federal regulations are similar to California's own regulation. This NPRM also protects Californians who travel from improper billing practices imposed by other states, something the CPUC could not otherwise do.

Furthermore, California is still free to apply general consumer protection, fraud, and deceptive business practice laws to CMRS carriers. Nothing in the California Telecommunications Bill of Rights (G.O. 168) would be preempted by the NPRM except Rule 6(g), which requires that all "government taxes, surcharges and fees required to be collected from subscribers and to be remitted to federal, state or local governments shall be listed in a separate section of the telephone bill entitled 'Government Fees and Taxes.'" As an alternative to this clause from the California Telecommunications Bill of Rights, the CPUC could simply require carriers to include a billing insert brochure explaining mandated rates and how they are calculated.

[7] *See* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.